INDEX

TABLE OF CASES

PAGE

STATUTES INVOLVED

MISCELLANEOUS

In The

Supreme Court of the United States

October Term, 1968

No.

STATE OF NORTH CAROLINA,

Appellant,

vs.

HENRY C. ALFORD,

Appellee

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT AS TO JURISDICTION

The appellant, pursuant to United States Supreme Court Rules 13(2) and 15, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment in question, and should exercise such jurisdiction in this case.

OPINION BELOW

The United States Court of Appeals for the Fourth Circuit on November 26, 1968, decided and filed its written opinion, which is not yet reported. A copy of the opinion is attached to this jurisdictional statement as Appendix A.

JURISDICTION

The appeal herein is from a final judgment decided and filed by the United States Court of Appeals for the Fourth Circuit on November 26, 1968, which held that "in the present posture of the North Carolina statutes the various provisions for the imposition of the death penalty are unconstitutional,

and hence capital punishment may *not*, under JACKSON, be imposed under any circumstances." The court further held invalid all capital convictions pursuant to the various North Carolina statutes, and cast doubt upon the validity of all guilty pleas to capital offenses which impose mandatory life sentences under the appropriate North Carolina statutes, together with casting doubt upon the validity of all convictions upon pleas to the various lesser included offenses when a defendant has been indicted for a capital offense.

The Supreme Court of the United States has jurisdiction to review by direct appeal the opinion complained of by the provisions of 28 U.S.C. Sec. 1254(2).

The following decisions sustain the jurisdiction of the Supreme Court to review the opinion on direct appeal in this case. UNITED GAS PIPE LINE COMPANY v. IDEAL CEMENT COMPANY, 369 U.S. 134 (1961); WATSON v. EMPLOYERS LIABILITY ASSUR. CORP., 348 U.S. 66 (1954), rehearing denied, 348 U.S. 921 (1954).

The constitutional provisions and statutes of the State of North Carolina declared unconstitutional by the Fourth Circuit Court of Appeals which are involved are:

North Carolina Constitution, Article I. Sec. 13:

"No person shall be convicted of any crime but by the unanimous verdict of good and lawful persons in open court . . . "

North Carolina General Statute 15-162.1. Plea of guilty of first degree murder, first degree burglary, arson or rape:

(b) In the event such plea is accepted, the tender and acceptance thereof shall have the effect of a jury verdict of a crime charged with recommendation by the jury in open court that the punishment shall be imprisonment for life in the State's prison; and thereupon, the court shall pronounce judgment that the defendant be imprisoned for life in the State's prison.

North Carolina General Statute 14-17. Murder in the first and second degree defined; punishment:

A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two (2) nor more than thirty (30) years in the State's prison.

North Carolina General Statute 14-21. Punishment for rape:

Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in State's prison, and the court shall so instruct the jury.

North Carolina General Statute 14-52. Punishment for burglary:

Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death: Provided, if the jury when rendering its verdict in open court shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.

North Carolina General Statute 14-58. Punishment for arson:

Any person convicted according to due course of law of the crime of arson shall suffer death: Provided, if the jury shall so recommend, at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in State's prison, and the court shall so instruct the jury.

The United States Court of Appeals for the Fourth Circuit held that the statutory scheme presented by these statutes for the imposition of the death penalty is unconstitutional, under the decision of this court in UNITED STATES v. JACKSON, 390 U.S. 570 (1968) and concluded that capital punishment may not, under JACKSON, be imposed under any circumstances; held unconstitutional all capital convictions and cast doubt upon the constitutional validity of all guilty pleas entered pusuant to N.C.G.S. 15-162.1 (plea of guilty of first degree murder, first degree burglary, arson or rape, supra), to capital charges, and cast doubt upon the constitutional validity of all convictions upon pleas of guilty to lesser included offenses when the defendant was indicted on a capital charge.

QUESTIONS PRESENTED

THE COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED:

I. IN HOLDING AND CONCLUDING THAT IN THE PRESENT POSTURE OF THE NORTH CAROLINA STATUTES THE VARIOUS PROVISIONS FOR THE IMPOSITION OF A DEATH PENALTY ARE UNCONSTITUTIONAL BY FORCE OF UNITED STATES v. JACKSON, 390 U.S. 570 (1968).

II. IN HOLDING AND CONCLUDING THAT IN THE PRESENT POSTURE OF THE NORTH CAROLINA STATUTES THAT CAPITAL PUNISHMENT MAY NOT BE IMPOSED UNDER ANY CIRCUMSTAN-

CES BY FORCE OF UNITED STATES v. JACKSON, 390 U.S. 570 (1968).

III. IN HOLDING AND CONCLUDING THAT ALL NORTH CAROLINA CAPITAL CONVICTIONS ARE INVALID BY FORCE OF UNITED STATES v. JACKSON, 390 U.S. 570 (1968).

IV. IN HOLDING AND CONCLUDING THAT THE JACKSON DECISION RETROACTIVELY APPLIES TO ALL CAPITAL INDICTMENTS WHEN THE DEFENDANT PLEADED GUILTY AND WAS SENTENCED TO LIFE IMPRISONMENT.

V. IN HOLDING AND CONCLUDING THAT THE JACKSON DECISION APPLIES TO INCLUDE PLEAS TO LESSER INCLUDED OFFENSES, WHERE THE DEFENDANT WAS ORIGINALLY INDICTED FOR A CAPITAL OFFENSE.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

N.C.G.S. 15-162.1 (Plea of guilty of first degree murder, first degree burglary, arson or rape);

N.C.G.S. 14-17 (Murder in the first and second degree defined);

N.C.G.S. 14-21 (Punishment for rape);

N.C.G.S. 14-52 (Punishment for burglary);

N.C.G.S. 14-58 (Punishment for arson); and

N.C.Const., Art. I, Sec. 13, all as previously set out under the heading "JURISDICTION."

STATEMENT OF THE CASE

At the December 2, 1963 Term of the Superior Court of Forsyth County, North Carolina, Henry C. Alford was indicted for the Murder in the First Degree of Nathaniel Young, and

Fred G. Crumpler, Esq., of the Winston-Salem, North Carolina, bar was appointed as his counsel.

Counsel thoroughly investigated the case, including the questioning of the investigating officers and all witnesses for the State. Counsel also contacted all witnesses named to him by the defendant, except for a person named as "Jap" who could not be located. Counsel found that none of the witnesses would be helpful to Alford, but that all of their testimony was detrimental and concluded that the State's case against the defendant was overwhelming.

Counsel discussed this matter with the defendant on several occasions, advised him of the testimony of the witnesses against him, and also advised him of the possible jury verdicts. Alford, after discussing the situation with counsel and his sister, who had been contacted by counsel, decided to enter a plea of guilty to second degree murder and signed a statement, read to him by Mr. R. B. Haskins, a Deputy Clerk of the Superior Court of Forsyth County, authorizing the entry of the plea of guilty to second degree murder.

On December 10, 1963, Alford, through counsel, entered a plea of guilty to second degree murder. Subsequent to the presentation of witnesses, the defendant took the stand. Alford admitted that he had been advised of his rights and he had authorized the entry of the guilty plea. He repeatedly admitted the entry of the plea, the weight of the evidence against him, and his continuing desire to enter the plea of guilty to second degree murder, although he did qualify his statement with a continuing denial of guilt. Alford also admitted to a homocide conviction in Virginia; nine convictions of armed robbery, and a lengthy list of other convictions. Before the guilty plea was accepted, there was an informal statement of the State's evidence, including declarations by defendant a few moments before the homocide of his purpose to kill the victim and admissions, shortly thereafter, that the defendant had done it. Thereupon, the plea of guilty to second degree

murder was accepted and Alford was sentenced to a term of thirty (30) years. He did not appeal.

Subsequently, Alford applied for a Writ of Certiorari to the Supreme Court of North Carolina, but the writ was denied on March 24, 1964, and the case remanded for a post-conviction hearing in the Superior Court of Forsyth County. At the December 7, 1964 Term of the Superior Court of Forsyth County, Alford was given a plenary hearing before Judge Frank M. Armstrong. On March 19, 1965, Judge Armstrong entered an Order containing findings of fact and conclusions of law denying the relief sought by Alford. Alford then requested a Writ of Mandamus from the Superior Court of Forsyth County and this was denied on April 14, 1965. He then applied for another post-conviction hearing and this was denied on May 3, 1965. Alford did not apply for a Writ of Certiorari to the Supreme Court of North Carolina to review the decision of Judge Frank M. Armstrong.

Alford filed his first application for Writ of Habeas Corpus with the United States District Court for the Middle District of North Carolina on June 16, 1965. On June 18, 1965 the Court entered an Order dismissing the application as petitioner was not within the jurisdiction of the Middle District Court. Alford was subsequently transferred within the jurisdiction of the Middle District Court of North Carolina and so advised the Court. The Court thereupon entered an Order considering the paper-writing as a motion to reconsider the petition which the Court granted. The Court had the benefit of the transcript of the State Post-conviction hearing and adopted the findings of fact of the State Court. In a lengthy opinion, Judge Gordon found petitioner's plea to be voluntary and denied the relief sought. (Memorandum and Order, Case No. C-112-G-65, Appellant's Appendix B)

Forty-eight days after the District Court's Order denying the Writ, Alford filed a Notice of Appeal. The District Court considered the Notice as a "Motion in the Cause to Allow an Appeal and a Motion for New Hearing." Both were denied

and from that denial Alford appealed. The Court of Appeals for the Fourth Circuit in Memorandum Decision No. 10,391 affirmed the denial. (Appellant's Appendix C)

On December 8, 1965, a petition for Writ of Habeas Corpus was filed directly in the United States Court of Appeals for the Fourth Circuit. In a Memorandum dated August 3, 1966, the Honorable Clement F. Haynsworth denied the petition. (Memorandum Decision No. 220, Appellant's Appendix D)

Alford filed still another petition for Writ of Habeas Corpus in the United States District Court for the Middle District of North Carolina. The Honorable Eugene A. Gordon again considered Alford's various contentions and once more concluded that none of his constitutional rights had been violated and denied the petition. (Memorandum Opinion and Order, Case No. C-98-G-67, Appellant's Appendix E.).

Alford then appealed to the United States Court of Appeals for the Fourth Circuit to review the summary denial by the Honorable Eugene A. Gordon in Memorandum Opinion and Order No. C-98-G-67, filed June 5, 1967, and the Fourth Circuit Court of Appeals concluded that, under the guiding principles of UNITED STATES v. JACKSON, 390 U.S. 570 (1968), enunciated subsequent to the judgment of the District Court, that the judgment appealed from should be reversed and in so doing held not only "that in the present posture of the North Carolina statutes the various provisions for the impositions of the death penalty are unconstitutional, and hence capital punishment may *not*, under JACKSON, be imposed under any circumstances," but went beyond the holding in UNITED STATES v. JACKSON, *supra*, in holding that JACKSON is applicable when the defendant pleaded guilty to a lesser included offense punishable only by term of years and not by death.

THE QUESTIONS SUBMITTED ARE SUBSTANTIAL

The Fourth Circuit Court of Appeals has held unconstitutional the entire statutory scheme for the imposition of the

death penalty for the crimes of rape, murder, burglary and arson, of the State of North Carolina, together with declaring unconstitutional the statute (N.C.G.S. 15-162.1) permitting a capital defendant to plead guilty and receive a mandatory life sentence. The Court of Appeals also held invalid all capital convictions in which the capital defendant was convicted of a capital crime and the jury did not recommend mercy. Additionally, the Court of Appeals held that all capital convictions upon a plea of guilty, with the imposition of a mandatory life sentence, may be invalid, in a case by case review, and convictions upon pleas of guilty to lesser included offenses, where the defendant was originally indicted for a capital charge, may also be invalid, in a case by case review.

The law enforcement officials of the Federal Government and of all fifty states have heretofore proceeded on the premise that the Constitution did not prohibit a statutory scheme such as that enacted in North Carolina. The constitutionality of a "not guilty" plea to a capital charge and the constitutional validity of a "guilty" plea to a capital charge with the imposition of a mandatory life sentence were never in doubt until this Court decided UNITED STATES v. JACKSON, 390 U.S. 570 (1968). The impact of the JACKSON decision, as erroneously expanded in ALFORD, could overshadow the landmark decision in GIDEON v. WAINWRIGHT, 372 U.S. 335 (1963) inasmuch as JACKSON-ALFORD are exclusively involved with defendants originally indicted for capital offenses and who usually, even before GIDEON, had court-appointed counsel. If ALFORD is to stand, it would involve the retrial of all defendants who have heretofore, at any time in the past, been convicted upon their pleas of guilty to indictments charging the capital crimes of rape, murder, burglary and arson, the four felonies declared to be capital in the State of North Carolina.

Statistics developed by the North Carolina Department of Correction indicate that as of February 1, 1969, there were 448 inmates serving life sentences and a review of twenty percent (20%) of all files produced the finding that 68.8%

of all inmates serving life sentences were convicted upon pleas of guilty to capital charges and received the mandatory life sentence. This, of course, does not include all those inmates who entered pleas to lesser included offenses, when charged with a capital offense, and to develop any statistics in this regard would require a file by file review of all inmates in the custody of the Department of Correction. The number, unquestionably, would be substantial.

The issues presented in this appeal are applicable far beyond the State of North Carolina. The procedures of the State of New Jersey were also declared unconstitutional by the Fourth Circuit in ALFORD (N.J.S.A. 2A:113-3, 4). Among the several states, other than North Carolina and New Jersey, in which a capital defendant may plead guilty and avoid the death penalty, are Louisiana (La. Code of Crim. Procedures, Art. 557); New York (N.Y. Code of Cr. Proc. Sec. 332.1); South Carolina (S.C. Code, Sec. 17-553.4); New Hampshire (N.H. Rev. Stat. Ann. 585:4, 5); Washington (Rev. Code of Wash., Title 9, Sec. 9.52.010) (Kidnaping); and Texas (Vernon's Ann. Code Crim. Proc. of Texas, Article 1.14). This list, which is not intended to be complete, illustrates the extent of the impact of JACKSON-ALFORD and the need for this Court to clarify the import of JACKSON upon the states.

As stated by this Court in STOVALL v. DENNO, 388 U.S. 293, 18 L. Ed. 2d 1199, 87 St. Ct. 1967 (1967).

> "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of new standards."

The ruling in JACKSON, as extended by ALFORD, was not foreshadowed in any case. No court announced such a requirement until the Fourth Circuit extended the holding in ALFORD. It is crystal clear that retroactive application of JACKSON and ALFORD would seriously disrupt the admin-

istration of our criminal laws. To void the conviction of every defendant indicted for a capital offense who pled guilty to the offense or to a lesser offense is so devastating that this court should need no further elaboration.

Although the State of North Carolina is appealing from the holding of the Fourth Circuit in its application of JACKSON, we emphasize yet another defect in ALFORD by quoting at length from Chief Judge Haynsworth's dissent:

> "I disagree, for I think a critical difference lies in the fact that Alford did not enter a plea of guilty to the charge of murder in the first degree. His plea of guilty was to the lesser offense of murder in the second degree, the maximum statutory punishment for which is imprisonment for not more than thirty years . . . .
>
> "The plea of guilty to murder in the second degree, however, was not the product of a constitutional infirmity in the statute. Had the infirmity not been present, the risk of capital punishment on a conviction of murder in the first degree would have constituted precisely the same pressure for a plea of guilty to a lesser included offense. Had North Carolina's statute provided that upon a conviction of murder in the first degree, whether after a trial on a plea of not guilty or after acceptance of a plea of guilty, the judge in his discretion could impose the death sesntence, or imprisonment for life or for a term of years, there would have been no constitutional defect in the statute. Yet, in those circumstances, the pressure upon Alford to enter a plea to murder in the second degree would not have differed in the slightest from the pressure he actually experienced.
>
> " . . . If he (Alford) is well advised, he will again tender a plea of murder in the second degree. He will have gained nothing, and needless time and money will have been expended because of an infirmity in the statute

which bears no causal relationship to the entry of the plea which the majority strikes.

"Whenever a defendant bargains for a plea to a lesser, included offense, he is substantially motivated by fear of exposure to the greater punishment authorized upon conviction of the crime as charged. If the maximum punishment for the greater offense is death, there are emotional overtones which are not present if the maximum punishment is imprisonment for life or for a term of years, but the presence of a risk of capital punishment creates no conceptual distinction in a determination of the validity of bargaining for a plea to a lesser, included offense. The death penalty is no longer imposed with frequency, and a defendant may have a greater fear of the risk of the more likely sentence of life imprisonment than the risk of less likely capital punishment. A difference in the prospect of imprisonment of one year rather than ten, of five years rather than twenty, of twenty years rather than life can weigh momentously with a defendant.

"Such plea bargaining, when the defendant is properly represented, is both useful and desirable in the administration of justice. It greatly conserves judicial time and energy, leaving the courts available for the trial of cases in which there is no basis for accommodation between the parties. It is a very humane avenue of protection for a person charged with crime who recognizes his exposure to the risk of heavy punishment.

"There is nothing in JACKSON which intimates disapproval of that kind of plea bargaining. Its absence, or the absence of agreement, is the thing that produced the JACKSON dilemma. Yet, that is all that happened here. Alford successfuly bargained for a plea to a lesser included offense, which made him immune to life imprisonment as well as to capital punishment. He would have done the same thing had the capital punishment provision of the

statute not been constitutionally defective. He may be expected to do the same thing again at his retrial. In JACKSON the statutory defect created the issue, here it has no causal connection with it." (Appendix A at p. 32)

The opinion of this Court in JACKSON did not discuss its applicabilitay to convictions upon pleas of guilty entered before JACKSON was rendered, nor did it discuss pleas to lesser included offenses, the historical area of "plea bargaining."

In JACKSON this Court reinstated the indictment and held that the defendant could plead to the indictment free of the burden imposed by the death penalty. In POPE v. UNITED STATES, 392 U.S. 651 (1968) this Court held that Pope's death sentence be vacated and the cause remanded for resentencing. Nowhere has this Court suggested a holding as sweeping in its total scope as the Fourth Circuit's holding in this case.

CONCLUSION

It is submitted that the decision of the Fourth Circuit in the application of the JACKSON doctrine in this case extends well beyond the intent of this Court—(1) in holding JACKSON to be applicable to North Carolina and declaring unconstitutional our entire scheme for capital punishment; (2) in holding that all capital convictions are invalid; (3) in holding that the ameliorating provisions of our statutes introduced unconstitutional burdens; (4) in holding that JACKSON applies to pleas of guilty to capital offenses requiring mandatory life sentences; (5) in holding that JACKSON applies to pleas to lesser included offenses; and, (6) in holding that this all applies retroactively. Any one, much less in combination, presents questions of immediate, vital importance, not only to North Carolina, but also to the Federal Courts and to many of our sister states. We believe that the questions submitted are truly substantial and present to this Court far reaching issues of the most vital public importance that must be answered.

Respectfully submitted,

ROBERT MORGAN
Attorney General

Andrew A. Vanore, Jr.
Staff Attorney

Jacob L. Safron
Staff Attorney

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 11,598

Henry C. Alford,
Appellant,

versus

State of North Carolina,
Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro.
Eugene A. Gordon, District Judge.

(Argued June 18, 1968. Decided November 26 1968.)

Before HAYNSWORTH, Chief Judge, and BRYAN and WINTER, Circuit Judges

Doris R Bray (Court-assigned counsel) [Smith, Moore, Smith, Schell & Hunter on brief] for Appellant, and Jacob L Safron, Staff Attorney, Office of the Attorney General of North Carolina (T. W Bruton, Attorney General of North Carolina, on brief) for Appellee.

WINTER, Circuit Judge:

Petitioner seeks review of the summary denial of his petition for a writ of habeas corpus. Because we conclude that, under the guiding principles of *United States v. Jackson*, 390 U. S. 570 (1968),[1] enunciated subsequent to the judgment of the district court, petitioner's plea of guilty to the crime of second degree murder was demonstrably coerced, the judgment appealed from will be reversed and the district court directed to issue the writ, staying its effect for a reasonable period to enable North Carolina to retry petitioner if it be so advised.

Petitioner was indicted by a grand jury of the State of North Carolina for murder in the first degree. With the approval of the state, he pleaded guilty to murder in the second degree and was sentenced on December 10, 1963, to a term of thirty years.

In due course, he sought and was granted a post-conviction hearing, pursuant to N. C. Gen. Stat. §§ 15-217 – 15-222 (1965). The state judge who conducted the hearing rejected petitioner's

---

1. See also, *Pope v. United States*, 392 U.S. 651 (1968) (per curiam), which applied the principle of *Jackson* to the death penalty provisions of the Federal Bank Robbery Act, 18 U.S.C. § 2113 (e) (1964). We note that the Court in *Pope* invalidated the capital punishment provision with no discussion of any peculiarities in the legislative history of the Bank Robbery Act such as those which occupied the Court in *Jackson* in relation to the Federal Kidnaping Act. Indeed, the legislative history of the Bank Robbery Act shows that *as originally enacted* imprisonment and capital punishment were alternative punishments, and that these alternatives were unaccompanied by a severability clause. 48 Stat. 783. Thus, *Pope* has precedential value in determining how statutes should be brought into conformity with *Jackson*, as a matter of statutory construction.

various constitutional contentions, including the claim that his guilty plea had been involuntarily induced. After the unsuccessful pursuit of various state remedies, petitioner sought a writ of habeas corpus from the district court. On September 3, 1965, the district judge denied the relief sought, expressly adopting the facts concerning the voluntariness of petitioner's plea as previously found by the state judge in the post-conviction proceedings. After the time for appeal to this Court had expired, petitioner filed with the district court a purported notice of appeal, which was treated by the district court as a motion for a certificate of probable cause and a motion for a new hearing. Both motions were denied, and we dismissed petitioner's appeal on the ground that it had not been perfected within the prescribed thirty-day time limit. *Alford v North Carolina*, No. 10,391 (4 Cir. August 25, 1966) (Mem.).

Concurrently, a petition for a writ of habeas corpus was filed in this Court and was denied by Chief Judge Haynsworth, who also rejected petitioner's various constitutional contentions.[2] Again, in 1967, petitioner sought a writ of habeas corpus from the district court and, again, relief was denied

---

2 It should be noted, however, that the record before Chief Judge Haynsworth apparently did not contain a transcript of petitioner's trial. See, *Alford v. North Carolina*, Misc. No. 220 (4 Cir. August 3, 1966) (Mem.) As we shall see, the trial transcript casts significant light upon the question of the voluntariness of petitioner's plea. Additionally, Chief Judge Haynsworth's disposition of the petition preceded the decision in *United States v Jackson*, 390 U. S. 570 (1968)

In acting upon the 1967 petition, the district judge apparently considered that inquiry into the voluntariness of petitioner's guilty plea was foreclosed by the prior consideration of this question by the district court and by Chief Judge Haynsworth. The district judge, therefore, dealt primarily with, and rejected, petitioner's contention that he had been deprived of the effective assistance of counsel.[3]

- I -

The State of North Carolina argues that petitioner has not presented either to this Court or to the district court any new factual allegations which should disturb the prior and unanimous findings of fact concerning the voluntariness of the plea of guilt. The rule of the federal courts, expressed in 28 U.S.C. § 2244 (1967 Supp.),[4] is not to entertain successive and repetitive

---

3 In view of our disposition of this appeal, we need consider neither this contention nor petitioner's other constitutional challenges urged upon the district court, which were an alleged unlawful search of petitioner's home and an alleged denial of the right to counsel at an interrogation. We deal only with the question of voluntariness of petitioner's guilty plea.

4. 28 U.S.C. (1967 Supp.):

" § 2244. Finality of determination

* * * * *

(b) When after an evidentiary hearing on the merits or a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such a person need not be entertained by a court of the United States or a justice or judge of the United States *unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ*, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ." (emphasis added)

habeas corpus petitions if the grounds asserted to support the petition have been previously decided on the merits, and the ends of justice would not be advanced by plenary consideration of the subsequent application. See, *Sanders v United States*, 373 U. S. 1, 11, 15-19 (1963). We do not depart from this doctrine. However, the instant appeal deals primarily not with new factual allegations but, rather, with what is admittedly a new question of law, namely, the applicability and effect of the Supreme Court's recent decision in the *Jackson* case. To the extent that the appeal raises this question of law, what was said in *Sanders* is significant:

> "Even if the same ground was rejected on the merits on a prior application, it is open to the applicant to to show that the ends of justice would be served by permitting the redetermination of the ground * * * If purely legal questions are involved, the applicant may be entitled to a new hearing *upon showing an intervening change in the law* or some other justification for having failed to raise a crucial point or argument in the prior application. * * * the foregoing enumeration is not intended to be exhaustive; the test is 'the ends of justice' and it cannot be too finely particularized." 373 U. S., at 16-17. (emphasis added.)[5]

---

5. While *Sanders* spoke of proceedings under 28 U.S.C. § 2255, the present federal substitute for habeas corpus, the considerations it discussed are no less applicable to habeas corpus by a prisoner incarcerated under state process.

To the extent that proper disposition of the instant appeal depends upon factual considerations, this is the first time that the transcript of petitioner's original trial and of his state post-conviction proceedings have both been before the full court. Res judicata has no place in habeas corpus proceedings. *Fay v. Noia*, 372 U. S. 391 (1963); *Sanders v. United States, supra*. Especially is this so when there is reason to reappraise the facts because of the introduction of a new pertinent rule of law. Thus, we conclude that we are not precluded from a reconsideration of petitioner's constitutional argument based upon the *Jackson* case, or his factual argument based upon a consideration of the entire record of the proceedings, alone, or in the light of *Jackson*.

– II –

There can be little question but that petitioner tendered his plea of guilty at a time that he was the subject of impermissible burdens condemned in the *Jackson* case. *Jackson* held invalid the death penalty provision of the Federal Kidnaping Act,[6] on the basis that it had a chilling effect upon the Sixth Amendment right to a jury trial, and the Fifth Amendment right "not to plead guilty," i. e., the privilege against self-incrimination. Of course, *Jackson* was a case which arose under the Fifth and Sixth Amendments

---

6. 18 U.S.C. (1964 Ed.)
" § 1201. Transportation

(a) Whosoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) *by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend,* or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed." (emphasis added.)

as such, while the instant case, a state prosecution, concerns the Fourteenth Amendment; but the test of what violates the Fourteenth Amendment in this area is the same.[7]

The federal statute in *Jackson* essentially created the special offense of "kidnaping where the victim has not been liberated unharmed" punishable by imprisonment for a term of years or for life or by death, upon the discretionary, yet binding, recommendation of the jury. Where a victim has not been liberated unharmed, only an accused *who exercised his right to a jury determination of guilt or innocence* faced the prospect of the possible imposition of the death penalty. This prospect was sufficient, in the view of the Court, to render the death penalty provision unconstitutional on the two separate grounds: (1) the fact that the jury alone could impose the death penalty tended to deter the exercise of the right to a jury trial guaranteed by the Sixth Amendment, and (2) the statutory scheme tended to encourage pleas of guilty or, stated otherwise, to discourage assertion of the Fifth Amendment right not to plead guilty.

North Carolina law presently prescribes the death penalty for murder in the first degree,[8] as well as certain other

---

7. The Sixth Amendment right of trial by jury is made applicable to the states by the Fourteenth Amendment. *Parker v. Gladden*, 385 U. S. 363 (1966); *Duncan v. Louisiana*, 391 U. S. 145 (1968). The Fourteenth Amendment outlaws coerced guilty pleas in state prosecutions. See, e. g., *Herman v. Claudy*, 350 U. S. 116 (1956). A coerced guilty plea is, of course, an infringement upon the right not to plead guilty, i. e., the privilege against self-incrimination.

8. N.C.Gen.Stat. §14-17 (1953):

"Murder in the first and second degree defined; punishment. – A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and *shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison,* and the court shall so instruct the jury. All other kinds of murder shall be deemed

crimes.[9] In each instance the penalty prescribed is death; in each instance also the jury may, in its discretion, obligatorily recommend that punishment be imprisonment for life. North Carolina does not permit an accused who pleads not guilty to waive a jury trial.[10] The accused may avoid a jury trial only if he pleads guilty and, by statute, a plea of guilty may not result in a punishment more severe than life imprisonment.[11] Thus, a person accused of a capital crime in North Carolina is faced with the awesome dilemma of risking the death penalty in order to assert his rights to a jury trial and not to plead guilty, or, alternatively, of pleading guilty to avoid the possibility of capital punishment. It was precisely this sort of inhibitory or chilling effect upon the exercise of constitutional

---

FOOTNOTE 8 (Continued from page 7)

murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison." (emphasis added.)

9. N.C.Gen.Stat. § 14-21 (1953) (forcible rape of female of age twelve years or more or carnal knowledge of female under twelve); N.C.Gen.Stat. § 14-52 (1953) (burglary in the first degree); N.C.Gen.Stat. § 14-58 (1953) (arson).

10. "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful persons in open court * * *." N.C. Const., Art. I, § 13. This right cannot be waived. *State v. Muse*, 219 N.C. 226, 13 S.E.2d 229 (1941); *State v. Hill*, 209 N.C. 53, 182 S.E. 716 (1935).

11. An accused who pleads guilty to one of the four capital crimes is to be sentenced to life imprisonment. N.C.Gen.Stat. § 15-162.1(a), (b) (1965). In the instant case, petitioner was allowed to plead guilty to murder in the second degree with the concurrence of the state and the trial court. The maximum penalty for this offense, to which appellant was sentenced, is thirty years. N.C.Gen.Stat. § 14-17 (1953).

rights which the Supreme Court condemned in *Jackson*, because a statutory scheme such as that employed by North Carolina "needlessly encourages" guilty pleas and jury waivers [12]

North Carolina seeks to distinguish the instant case from *Jackson* on the ground that under the Federal Kidnaping Act the jury possessed the authority to *increase* the punishment to be imposed upon the defendant beyond that which the court could impose; while under North Carolina law the statutorily-prescribed penalty for murder in the first degree and certain other crimes is death and the jury is merely given the power to *mitigate* the harshness of the maximum penalty. We are not persuaded that the difference amounts to a distinction. Under both statutes it is the jury which determines guilt, and that jury alone which, in its discretion, decides if the death penalty is to be exacted. As to imposition or non-imposition of the death penalty the jury's determination is exclusive, conclusive and final. Of greater significance, in *Jackson* the argument was advanced that the Federal Kidnaping Act's penalty provisions operated to "mitigate the severity of punishment" and that it was, therefore, immaterial that the Act "may have the incidental effect of inducing defendants not to contest in full measure" their culpability. The Court explicitly rejected this contention, stating that the consequent chilling effect upon the exercise of constitutional rights was "unnecessary and therefore excessive." 390 U. S. 570, at 582. *Jackson* thus renders unavailing North Carolina's argument.

12. Indeed, it is arguable that the North Carolina statutory scheme is more objectionable than the former Federal Kidnaping Act. Under the federal statute, the accused had three choices: he could plead guilty, not guilty and accept a jury trial, or not guilty and, with the consent of the prosecutor and the court, waive a jury trial. Thus, an accused could simultaneously avoid the death penalty and assert his innocence in a guilt-determining proceeding, namely, a bench trial. The accused in North Carolina has no such option; *if he asserts his innocence at all*, he risks capital punishment. Therefore, unlike the federal scheme, *every* defendant in a North Carolina capital case is, in the phraseology of *Jackson*, "needlessly *encourage* [d]" to forego his rights to a jury trial and not to plead guilty.

Nor do we find persuasive North Carolina's further argument that in *Jackson* the Court did not question the constitutionality of the death penalty *per se*. Undoubtedly this is true, but the Court in *Jackson* was careful to state that whatever the power to impose a death penalty "Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right." 390 U. S. 570, at 583. The clear import of *Jackson* is that if North Carolina wishes to retain the death penalty it must do so by means different from those presently enacted. That there are other means is self-evident. See, e. g., *United States v. Jackson*, 390 U. S., at 582-83.

We are thus constrained to disagree with the dictum of the Supreme Court of North Carolina in *State v. Peele*, 274 N. C. 106, 161 S.E.2d 568 (1968), that there are "certain material differences" between the Federal Kidnaping Act and the North Carolina statutes,[13] so that "Jackson is not authority for holding the death penalty in North Carolina may not be imposed under any circumstances." (161 S.E.2d, at 572). To the contrary, we conclude that in the present posture of the North Carolina statutes the various provisions for the imposition of the death penalty are unconstitutional, and hence capital punishment may *not*, under *Jackson*, be imposed under any circumstances.[14]

---

13. But see, *Laboy v. State of New Jersey*, 266 F. S. 581 (D. N.J. 1967), which reached an opposite conclusion with respect to the New Jersey statutes which in turn are like the North Carolina statutes.

14. As Chief Judge Haynsworth notes in dissent, South Carolina has sought to avoid the *Jackson* problem by holding in *State v. Harper*, ____ S. C. ____, 162 S.E.2d 712 (1968), that the South Carolina statute, which makes a plea of guilty to murder in the first degree, when accepted, the equivalent of a verdict of guilty with a recommendation of mercy (§ 17-553.4, 1967 Supp. to 1962 Code of Laws), is invalid and by requiring the submission of the issue of punishment to the jury in every case. We express no view whether the laws of South Carolina, as so construed, comport with *Jackson*. We note in passing that the purported solution to the *Jackson* problem arrived at by the South Carolina court runs directly counter to the current national trend which has produced a marked curtailment in the employment of the death penalty device. However, it is enough for the purposes of this

Since the argument in this case, the Supreme Court of New Jersey has decided *State v. Forcella*, 52 N. J. 263, 245 A.2d 181 (1968). Because of the similarity between the North Carolina and New Jersey statutes, the case is of significance to us. Under New Jersey law an individual accused of murder has essentially two choices: (1) he may assert his innocence by demanding a trial by jury, in which case, if convicted, he may be sentenced to death, or (2) he may enter a plea non vult, or nolo contendere, which, if accepted, carries a maximum penalty of life imprisonment. In *Forcella* this statutory scheme was assailed under *Jackson*.

By a split decision the New Jersey Court held the *Jackson* rationale not controlling. This result was influenced by several considerations, but the real basis of decision was, we believe, an erroneous reading of *Jackson*. The majority pointed out that under New Jersey law only a jury could determine guilt or innocence if that issue were contested. Coupled with this fact, the majority read *Jackson* to render the Sixth Amendment right applicable only when there are two alternative guilt-determining processes and the jury trial alternative produces greater risks for the accused, and, further, to hold that both the Fifth and Sixth Amendment rights must be violated before the statutory scheme would become vulnerable to constitutional attack.

We do not find this reading persuasive. Under a strict *Jackson*–type statute, such as the Federal Kidnaping Act, an accused who pleads not guilty and seeks a bench trial waives *only* his right to a jury trial. An accused who pleads guilty (or non vult) in either the *Jackson* or *Forcella* situations simultaneously foregoes *both* his right to a jury trial and his right not to plead guilty.

FOOTNOTE 14 (Continued from page 10)

case that North Carolina has not amended its statutes, nor has its Supreme Court undertaken to limit them in the light of *Jackson*.

Jackson arose in the context of a challenge to the indictment before the defendant entered any plea. Since Jackson had thus given no indication that he might ultimately wish to waive his right to a jury trial or his right to assert his innocence, the Court had before it the effect of the federal act on both of Jackson's rights. We think it incorrect to say that they were "intertwined" so that the majority in *Jackson* did not "say that a statute which did no more than limit the penalty upon acceptance of a guilty plea must violate the Fifth Amendment." *State v Forcella,* 245 A.2d 185-186.

Like the dissenters in *Forcella,* we read *Jackson* to treat the Fifth and Sixth Amendments to be independent constitutional underpinnings for the result. It follows, therefore, that the New Jersey statutory scheme, like that of North Carolina, is more conspicuously invalid than the federal statute in *Jackson,* because under the federal statute an accused could assert his innocence and avoid a death sentence by a bench trial, while in New Jersey avoidance of a death sentence may be accomplished only by waiver of the right to plead not guilty *and* by waiver of the right to a jury trial. *Jackson* condemned the needless encouragement of guilty pleas and waiver of jury trails Greater encouragement is inevitable in a New Jersey-type statute than in the federal statutes held invalid, in part, in *Jackson* and *Pope.* Thus, we decline to follow *Forcella*

Jackson arose by a motion to quash an indictment grounded on the Federal Kidnaping Act. The case at bar arises, *inter alia,* from an attack upon the voluntariness of a plea of guilty While *Jackson* clearly stands for the proposition that the death penalty provisions of North Carolina constitute an invalid burden upon the right to a jury trial and the right not to plead guilty, it falls short of holding

that the North Carolina statutory provisions for the imposition of capital punishment are in themselves inherently coercive.[15] In *Jackson* the Court stated that the mere fact that an accused had pleaded guilty to a charge under the Federal Kidnaping Act did not necessarily render his plea involuntary and require reversal of his conviction.[16]

By a parity of reasoning, we think that a defendant who has pleaded guilty when charged with a capital offense in North Carolina is not necessarily entitled to post-conviction relief as a matter of law. *Jackson* by defining what are the impermissible burdens of a statutory scheme like that of North Carolina must be read, however, to hold that a prisoner is entitled to relief if he can demonstrate that his plea was a product of those burdens – specifically, that his principal motivation to plead guilty or to forego a trial by jury was to avoid the death penalty. *Jackson* thus defined a new factor to be given weight in determining the voluntariness of a plea – a factor present in full measure in the instant case because of the

15. "* * * the evil in the * * * statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right." 390 U. S., at 583. (emphasis in original.) See also, *Gilmore v. California*, 364 F.2d 916, 918 (9 Cir. 1966); *LaBoy v. New Jersey*, 266 F. S. 581, 584-85 (D. N.J. 1967).

16. See, 390 U. S., at 583 & n. 25. The Court also referred to its opinion in *Griffin v. California*, 380 U. S. 609 (1965), which held that a defendant's failure to testify could not be commented upon by the prosecution or the trial court. The Court noted that it "obviously does not follow that every defendant who ever testified at a pre-*Griffin* trial in a State where the prosecution could have commented upon his failure to do so is entitled to automatic release upon the theory that his testimony must be regarded as compelled." *Id.*, at 583, n. 25.

North Carolina statutory scheme.[17] As we read *Jackson*, we must determine the extent to which, if at all, petitioner was moved to plead guilty because of the incentive which the North Carolina statutory scheme supplied to achieve that result.[18]

– III –

In the light of the principles we distill from *Jackson*, we have no hesitancy in concluding from our examination of the record that petitioner's plea of guilty was made involuntarily, and that petitioner is entitled to relief by habeas corpus.[19]

---

17. It is immaterial in our view that petitioner pleaded guilty to murder in the second degree rather than to murder in the first degree under which he was charged. For all that appears in the record, the state had not surrendered its right to prosecute petitioner for first degree murder until the time when he agreed to plead guilty to second degree murder. Of course, if the state had determined that it would only prosecute for second degree murder, *and this fact had been known to the petitioner before his plea was entered*, then it could hardly be maintained that his guilty plea was a product of a fear of the death penalty.

    To us the *Jackson* defect in the North Carolina statutes potentially infects the validity of the acceptance of a plea of guilty to any lesser included offense. This is not to say, however, that where, as here, the plea is accepted to a lesser included offense, there is not a higher burden of proof upon one attacking the judgment entered thereon to show that the plea was the result of an invidious consideration than if the plea were to the degree of the crime which would support capital punishment. The very process of downgrading the charge may well suggest that the plea was motivated by factors other than a fear of death; certainly, it is circumstantial evidence that punishment by death was not a substantial possibility in view of the prosecutor's acquiescence in significant concessions. From a strictly evidentiary standpoint, we think this case is not the ordinary one and petitioner has met the burden of proof placed on him.

18. To the extent that *Gilmore v. California*, 364 F.2d 916 (9 Cir. 1966), cited to us by North Carolina, may be read as holding that a statutorily supplied incentive to plead guilty so as to avoid the death penalty may not as a matter of law render the plea involuntary, we think that its holding has been undermined by *Jackson*.

19. The dissent argues that we perform a futile act in granting post-conviction relief because, if it is assumed that North Carolina corrects the *Jackson* defect in its statutory scheme, petitioner "if he is well advised" will merely plead guilty once again to second degree murder. Of course, North Carolina may, at some future time, enact a capital punishment statute which is not constitutionally infirm under *Jackson*. However, we do not agree with the implied premise of the dissenting opinion that petitioner

The record is uncontradicted that from the time that petitioner entered his plea he professed his innocence of any homicide. No court has ever found that he pleaded guilty other than to avoid possible imposition of the death penalty.[20] During the course of his first appearance before the court, petitioner stated:

> "* * * I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and *I just pleaded guilty bacause they said if I didn't they would gas me for it,* and that is all." (emphasis added.)

Later, when questioned by his attorney concerning whether he still desired to plead guilty, petitioner reiterated his innocence, and gave voice to his fear of what the jury might do:

> "Well, I'm still pleading that you all got me to plead guilty. I plead the other way, circumstantial evidence; that the jury will prosecute me on—on the second. You told me to plead guilty, right. I don't—I'm not guilty but I plead guilty."

FOOTNOTE 19 (Continued from page 14).

originally pleaded guilty because of the evidence informally arrayed against him, rather than because of the threat of an unconstitutionally imposed death penalty. As the text will show, petitioner, immediately after hearing the prosecutor's claim of what it would prove, responded, "I ain't shot no man."

20. In denying petitioner's application for a writ of habeas corpus to this Court, Chief Judge Haynsworth so characterized the state post-conviction judge's findings:

"* * * there is a conflict in the testimony over why Alford actually pleaded guilty but the *state court found* that he did so because his attorney wisely advised him to plead guilty to second degree murder and *escape the possibility of capital punishment. * * * The state judge found* that Alford decided to plead guilty because he had no defense to the State's case against him for first degree murder and *because the guilty plea allowed him to escape the possibility of the death sentence. There is ample evidence to support this finding of fact." Alford v. North Carolina,* No. 220 (4 Cir. August 3, 1966) (Mem.). (emphasis added.)

The trial judge inquired whether petitioner still wished to plead guilty, and the question evoked the following response:

> "Yes, sir, I plead guilty on– from the circumstances that he told me "

The plain meaning of petitioner's statements at the time that he entered his plea was fully corroborated by the testimony of his trial counsel when the latter was called as a witness at the state post-conviction hearing. The attorney, Mr. Crumpler, described what had transpired as follows:

> "The understanding that I had when the trial proceeded–the Judge–Judge Johnston either asked him or I asked Judge Johnston to ask him to make sure that his plea was clear to him, and it's my memory–to the best of my memory he stated that he didn't do what he was charged of but he was going to plead guilty, or plead guilty to second degree *because he didn't want to run the risk of losing his life* I don't pretend that that is verbatim, but that is to the best of my recollection " (emphasis added)

The petitioner also testified in the state post-conviction proceedings, and his testimony then was perfectly consistent with what he had said at the time that he entered his plea:

> "Mr. Crumpler said *if I didn't enter a plea I would surely get a death sentence* That is what he told me. And my sister and a policeman, Joe McFadden, my first cousin, he was there, too And I can't read or write, and he just run over it because he knew I couldn't understand it and *he said if I didn't take a plea of second degree I would surely get a death sentence*. And my

sister said I'd better take it,[21] and he told Judge Johnston that I told him to give me thirty years, said I don't know how to try this case. Then, nobody didn't say that I done that crime, nobody in court said I did the crime." (emphasis added.)

We think that there is no question but that the incentive supplied to petitioner to plead guilty by the North Carolina statutory scheme was the primary motivating force to effect tender of the plea, especially since throughout the proceedings petitioner has protested his innocence.[22] Further evidentiary hearings are unnecessary. Under *Jackson*, therefore, the judgment entered on the plea cannot stand.

REVERSED and REMANDED

---

21 Alford's sister, Mrs. Christine Greene, related her version of this encounter in an affidavit filed in the Superior Court of Forsyth County, North Carolina, dated June 19, 1965. It reads in pertinent part as follows:

"Mr. Crumpler then advised Henry that the Solicitor had intimated that he would recommend that the Court accept a plea of guilty to second degree murder and Mr. Crumpler explained that the maximum punishment for second degree murder was thirty years and that in his, Mr. Crumpler's opinion, the Court would probably sentence Henry for thirty years due to the nature of the case. Henry at first stated that he wanted to plead guilty to second degree murder; then a few minutes later, he changed his mind. I explained to Henry that if he got thirty years, I could still visit him and *it would be better than running a risk of losing his life*. Henry, at this time, was undecided and Mr. Crumpler left the cell and left us with Henry. A few minutes later, he returned and advised Henry that whatever decision he made would have to be his own decision and that no one could make the decision for him. Mr. Crumpler also advised that he could make either decision, but that we would have to reach some decision because the case was about to be called for trial. *Henry then said that he didn't kill the deceased person, but that he did not want to be killed either, and at this time stated that he wanted to enter a plea of guilty to second degree murder.*" (emphasis added.)

22 Whether petitioner is in reality guilty or innocent has not been judicially determined. In any event, petitioner has never conceded his guilt. That fact alone should have precluded plea bargaining under the rule announced in *Bailey v. MacDougall*, 392 F.2d 155, 158 n. 7 (4 Cir. 1968), "Plea bargaining that induces an innocent person to plead guilty cannot be sanctioned. Negotiations must be limited to the quantum of punishment for an *admittedly* guilty defendant." (emphasis supplied.) This case is thus an inappropriate vehicle in which to discuss plea bargaining.

HAYNSWORTH, Chief Judge, dissenting:

I disagree, for I think a critical difference lies in the fact that Alford did not enter a plea of guilty to the charge of murder in the first degree. His plea of guilty was to the lesser offense of murder in the second degree, the maximum statutory punishment for which is imprisonment for not more than thirty years. In the historical context of North Carolina's statutes, this is a distinction of importance.

In *United States v. Jackson*, 390 U.S. 570, the Supreme Court held unconstitutional a statutory scheme under which capital punishment could be imposed only by a jury after a trial upon a plea of not guilty. The risk of death, which would be encountered only if the defendant pled not guilty and demanded a jury trial was held to be an impermissible burden upon the exercise of the Fifth Amendment right not to incriminate oneself and the Sixth Amendment right to a jury trial. The Supreme Court concluded that the capital punishment amendment of the "Lindbergh Act" was thus unconstitutional, but the remainder of the statute, as enacted earlier, was left intact. Dismissal of the indictment, therefore, was vacated and the case remanded, so that the prisoner would be required to exercise his choices as to his plea and to a jury trial in a context in which the risk of death would not burden one set of choices.

Here the defendant clearly stated when he tendered his plea that he was substantially motivated by the fear of execution if he entered a plea of not guilty. His contemporaneous claim of innocence may be suspect,[1] but the circumstances fully support

1. Before the guilty plea was accepted, there was an informal statement of the State's evidence, including declarations by the defendant a few moments before the homicide of his purpose to kill the victim and admissions, shortly thereafter, that he had done it. If the State's case at a trial was as strong as the statement indicated, the defendant would have little hope of acquittal.

his conscious purpose to avoid the risk of capital punishment. Under the circumstances, had the plea been to first degree murder, I would agree with the majority that the conviction should be set aside, for the victim of the very pressures *Jackson* sought to avoid ought not to be left to suffer their consequences.

The plea of guilty to murder in the second degree, however, was not the product of the constitutional infirmity in the statute. Had the infirmity not been present, the risk of capital punishment on a conviction of murder in the first degree would have constituted precisely the same pressure for a plea of guilty to a lesser included offense. Had North Carolina's statute provided that upon a conviction of murder in the first degree, whether after a trial on a plea of not guilty or after acceptance of a plea of guilty, the judge in his discretion could impose the death sentence, or imprisonment for life or for a term of years, there would have been no constitutional defect in the statute. Yet, in those circumstances, the pressure upon Alford to enter a plea to murder in the second degree would not have differed in the slightest from the pressure he actually experienced.

Alford will be subject to retrial, of course. North Carolina may remove the infirmity from its statute, so that when Alford is re-arraigned, he will be in the same position he was in initially.[2] If he is well advised, he will again tender a plea of murder in the second degree. He will have gained nothing, and needless time and money will have been expended because of an infirmity in the statute which bears no causal relationship to the entry of the plea which the majority strikes.

Whenever a defendant bargains for a plea to a lesser, included offense, he is substantially motivated by fear of exposure to the greater punishment authorized upon conviction of the crime as

---

2 I do not here consider the impact which Green v. United States, 355 U.S. 184, and Patton v. North Carolina, 4 Cir., 381 F.2d 636, might have upon retrial. See n. 4 infra.

charged. If the maximum punishment for the greater offense is death, there are emotional overtones which are not present if the maximum punishment is imprisonment for life or for a term of years, but the presence of a risk of capital punishment creates no conceptual distinction in a determination of the validity of bargaining for a plea to a lesser, included offense. The death penalty is no longer imposed with frequency, and a defendant may have a greater fear of the risk of a more likely sentence of life imprisonment than of the risk of less likely capital punishment. A difference in the prospect of imprisonment of one year rather than ten, of five years rather than twenty, of twenty years rather than life can weigh momentously with a defendant.

Such plea-bargaining, when the defendant is properly represented is both useful and desirable in the administration of justice. It greatly conserves judicial time and energy, leaving the courts available for the trial of cases in which there is no basis for accommodation between the parties. It is a very humane avenue of protection for a person charged with crime who recognizes his exposure to the risk of heavy punishment.

There is nothing in *Jackson* which intimates disapproval of that kind of plea-bargaining. Its absence, or the absence of agreement, is the thing that produced the *Jackson* dilemma. Yet, that is all that happened here. Alford successfully bargained for a plea to a lesser, included offense, which made him immune to life imprisonment as well as to capital punishment. He would have done the same thing had the capital punishment provision of the statute not been constitutionally defective. He may be expected to do the same thing again at his retrial. In *Jackson* the statutory defect created the issue, here it has no causal connection with it.

There is the fact that everyone involved in the negotiation of Alford's plea reasonably believed that North Carolina's statute validly authorized a jury to impose capital punishment upon a verdict of guilty of first degree murder, while limiting the court to the imposition of a sentence of

life imprisonment upon a plea of guilty to that offense. Their misconception, revealed by *Jackson,* is relevant here, only if the effect of *Jackson* is an invalidation of the death penalty in North Carolina. We have no present basis for a conclusion that it is, as a comparative analysis of the Federal Kidnapping Act and North Carolina's murder statutes will demonstrate.

The Supreme Court in *Jackson* carefully considered the history of the Lindbergh Kidnapping Act. As originally enacted it permitted no more than life imprisonment. Later, however, it was amended to permit a jury, in its discretion, to impose capital punishment if the victim was not released unharmed. It was the amendment which created the difficutly and the pressure to forego a defendant's Fifth and Sixth Amendment rights. It was the amendment which the Court struck, for it reasonably concluded that Congress would prefer that the statute be left in its original form than for the nation to be left with no federal kidnapping statute.

The history of North Carolina's murder statutes contrasts starkly with that of the Lindbergh Act. Unitl 1949 the only penalty for first degree murder in North Carolina was death. Neither judge nor jury had any discretion about it, though juries have ways of avoiding the harsh strictures of such laws, and many a defendant whom the jury believed guilty of first degree murder must have been found guilty of a lesser, included offense. In 1949, however, N.C. Gen. Stat. § 14-17 was amended to permit the jury in its discretion to attach to its verdict of guilty a recommendation of mercy. Such a recommendation required the court to impose a sentence of life imprisonment. Four years later, in 1953, § 15-162.1(b) was enacted making a plea of guilty, when accepted by the court, the equivalent of a verdict of guilty with a recommendation of mercy and prescribing the imposition of a life sentence.

The amendments to the North Carolina statutes, like the amendment of the Lindbergh Act, introduced the *Jackson* infirmity. Though the North Carolina amendments were ameliorating, because they introduced the infirmity into

the statutory scheme, they may be rationally said to be unconstitutional, just as the amendment in *Jackson*, leaving intact North Carolina's preamendment statute.

The Supreme Court of South Carolina recently dealt with the *Jackson* problem in *State v. Harper*, S.C. , 162 S.E. 2d 712, (1968). It concluded that *Jackson* invalidated South Carolina's statute, similar to North Carolina's § 15-162.1 (b), making a plea of guilty to murder in the first degree, when accepted, the equivalent of a verdict of guilty with a recommendation of mercy. It prescribed the submission of the question of punishment to a jury in every capital case, regardless of the plea.

There is no reason to suppose that North Carolina's Supreme Court will not come to a similar resolution of the *Jackson* problem. It has indicated no antipathy toward capital punishment.[3] The death penalty has been an integral part of the laws of North Carolina relating to murder since it first became a state, and it is not suggested that is is unconstitutional *per se*. Since it was the 1949 and 1953 Acts which introduced the *Jackson* infirmity, it may be expected that the courts of North Carolina will invalidate them, or portions of them, rather than all or parts of her earlier integrated statute.

---

3. The contrary is indicated by its holding that a prosecutor, by asking for life imprisonment only, may not limit the jury's discretion to impose capital punishment. State v. Denny, 249 N.C. 113; 105 S.E. 2d 446 (1958). The jury had directed life imprisonment, but on the prisoner's appeal the Court ordered a new trial at which the jury's discretion to impose capital punishment would not be limited as it had been by prosecutor and judge.

Whatever the courts of North Carolina or her legislature may do to meet the problem, we now have no right to lay the infirmity to North Carolina's hoary authorization of the death penalty rather than to the later statutes which injected into the scheme the *Jackson* deprivations of Fifth and Sixth Amendment rights. There is presently no basis for our assuming the demise of capital punishment in North Carolina. [4]

The fact of the misconception of North Carolina's lawyers and judges that her statutes validly authorized the imposition of the death penalty only by a jury would be relevant, therefore, only if the plea was to the capital offense. In such a case, had the defendant known at the time that his plea would not limit his exposure to capital punishment, he might well have chosen to plead not guilty. That misconception is wholly irrelevant, however, when the plea is to a noncapital offense. Knowledge at the time that the court might impose capital punishment upon a plea of guilty to the capital crime could have had no possible effect upon his choice to plead guilty to the lesser, noncapital offense.

---

4 This conclusion is unaffected by Pope v. United States, 392 U S 651. In *Pope* the Supreme Court, on the authority of *Jackson* and the Solicitor General's concession vacated a death sentence imposed under the Federal Bank Robbery Act, 18 U S C A 2113(e). It permits the imposition of the death penalty if the defendant in the course of the offense or subsequent flight or escape kills or kidnaps someone, but the death sentence may be imposed only if a jury directs it. The *Jackson* defect was introduced into the statute as originally enacted. There was no prior history of the statute free of the *Jackson* infirmity. In the context of our problem, therefore, *Pope* is neutral. It does not militate against invalidation of an ameliorating amendment which introduced the *Jackson* defect rather than invalidation of portions of an earlier statutory scheme which contained no *Jackson* defect. If, therefore, *Jackson* requires invalidation of North Carolina's present statutory scheme of imposing punishment for murder in the first degree, we have no present warrant for assuming that it invalidates anything other than the amendment which introduced the defect into the scheme, just as *Jackson* held.

I think, therefore, that *Jackson* requires the retrial in North Carolina only of those defendants, who, for the purpose of avoiding risk of capital punishment, entered guilty pleas to the capital offense.[5]

---

5 *Quare* whether Patton v. North Carolina, 4 Cir., 381 F 2d 636, applies in this kind of a situation to foreclose putting the defendant, who seeks a retrial, to the choice he contends he should have had in the first instance.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

HENRY C. ALFORD, Petitioner	)	
v.	)	NO. C-112-G-65
STATE OF NORTH CAROLINA, Respondent	)	

MEMORANDUM OPINION AND ORDER

Petitioner, Henry C. Alford, a prisoner of the State of North Carolina, hereinafter referred to as petitioner, filed with this Court a petition for a writ of habeas corpus, and accompanied the petition with an affidavit of poverty. The petition was filed *pro se* and an order has heretofore been entered permitting the petition to be filed without the prepayment of costs or fees, or security therefor. Petitioner contends that he was denied due process of law in that his plea of guilty to a charge of second-degree murder was not voluntary; that he remained in the custody of law enforcement officers for a period of forty-two hours before a warrant was issued for his arrest; that his house was illegally searched and the alleged murder weapon was illegally seized; and that he was not allowed to have witnesses at his trial. The Court denies the relief requested by the petitioner for reasons hereinafter set forth.

Petitioner filed his first application for a writ of habeas corpus with this Court on June 16, 1965. On June 18, 1965, the Court entered an order dismissing the application as petitioner was incarcerated at Raleigh, North Carolina, which is outside the territorial jurisdiction of this Court. On June 21, 1965, the Court received a paper-writing which informed the

Court that petitioner had been transferred to Blanche, North Carolina, within the territorial jurisdiction of this Court and that he was then incarcerated there. Thereafter, on July 7, 1965, the Court entered an order stating that it considered the paper-writing a motion to reconsider the petition of the petitioner which the Court granted and further ordered the petition to be filed.

Petitioner was taken into custody by law enforcement officers in Winston-Salem, North Carolina, on November 22, 1963, and a warrant for petitioner's arrest was issued on November 23, 1963. Subsequently, at the December 2, 1963, Term of Superior Court of Forsyth County, petitioner was indicted for murder, and Fred G. Crumpler was appointed attorney for the petitioner by the Superior Court. On December 10, 1963, petitioner's case was called for trial in the Superior Court of Forsyth County, and upon a plea of guilty to second-degree murder, petitioner was sentenced to thirty years imprisonment. No appeal was taken. Subsequently, petitioner applied for a writ of certiorari from the Supreme Court of North Carolina, but the writ was denied on March 24, 1964, and the case remanded to the end that the petitioner be given a post-conviction hearing in the Superior Court of Forsyth County pursuant to North Carolina General Statutes, Chapter 15, Article 22, Section 217. At the December 7, 1964, Term of Superior Court of Forsyth County, petitioner was given a hearing before Judge Frank M. Armstrong. Thereafter, on March 19, 1965, Judge Armstrong entered an order containing Findings of Fact and Conclusions of Law denying petitioner any relief. Petitioner then requested a writ of mandamus from the Superior Court of Forsyth County, and the same was denied on April 14, 1965. Petitioner then applied for another post-conviction hearing, and this was denied on May 3, 1965.

After the post-conviction hearing at the December 7, 1964, Term of Superior Court of Forsyth County and the rendition of the order by Judge Armstrong on March 19, 1965, there is no evidence that the petitioner applied for a writ of certiorari

in order that the Supreme Court of North Carolina might review the hearing and decision. Where the avenue for review by the Supreme Court of North Carolina is still open, a failure to request such review may be fatal to the Court's jurisdiction as the petitioner would have failed to exhaust his state remedies. 28 U.S.C.A. § 2254: *Rhinehart v. North Carolina*, 4 Cir., 344 F. 2d 114 (1965). Under Chapter 15, Section 222, of the General Statutes of North Carolina, it is provided that the writ of certiorari must be applied for within sixty days after the entry of judgment. The petitioner has neglected to pursue his remedy in this respect within the time allotted and is now precluded from obtaining such writ. Therefore, it appears that the petitioner has exhausted all state remedies in that certiorari is not now available to him.

The petitioner alleged that he has been denied due process of law as guaranteed by the Constitution in that, first, in his trial in the Superior Court of Forsyth County, his plea of guilty was not voluntary, but was coerced by his court-appointed attorney, Fred G. Crumpler, and the Clerk of the Superior Court; second, that he remained in custody of law enforcement officers for a period of forty-two hours before a warrant for his arrest was issued; third, that his house was illegally searched and the alleged murder weapon was illegally seized; and fourth, that he was not allowed to have witnesses at his trial.

The Court is of the opinion that if the petitioner's plea of guilty is found to be voluntary, then his other three contentions are not sufficient to merit him relief. Entry of a valid plea of guilty and a conviction based on such plea waives all nonjurisdictional defects such as alleged by petitioner in his second, third and fourth contentions. *Hoffman v. United States*, 9 Cir., 327 F. 2d 489 (1964); *Adkins v. United States*, 8 Cir., 298 F. 2d 842 (1962), cert, den. 370 U. S. 954, 82 S. Ct. 1604, 8 L. Ed. 2d 819; *Bloombaum v. United States*, 4 Cir., 211 F. 2d 944 (1954). Being of the opinion that the petitioner's plea was voluntary, the Court will only consider in this Memorandum the first contention of the petitioner.

This Court may deny petitioner a hearing and accept the findings of fact of the state court if petitioner has been given a full and fair hearing in the state court and its findings of fact meet the required standards. *Townsend v. Sain*, 372 U. S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963); *United States v. Wilkins*, 2 Cir., 333 F. 2d 742 (1964), cert. den. 379 U. S. 977, ... S. Ct. ....., ...L. Ed. 2d .....; *United States ex rel. Hall v. People of State of Illinois*, 7 Cir., 329 F. 2d 354 (1964), cert. den. 379 U. S. 891, ... S. Ct. ....., ...L. Ed. 2d .....; *Davis v. Holman*, 237 F. Supp. 490 (M.D. Ala. 1965); *Mills v. Holman*, 225 F. Supp. 886 (M.D. Ala. 1964).

The Supreme Court of the United States in *Townsend v. Sain*, 373 U. S. 293, 312, 313, sets forth the rules and standards for federal courts to follow in accepting the findings of fact of the state court by saying:

> "* * * In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.
>
> "We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."

With these standards in mind and after giving consideration to the record as a whole, including the transcript of the post-conviction hearing, the Court finds that the merits of the petitioner's contention that his plea of guilty was not voluntary has been properly and judiciously resolved after a full and

fair hearing, and the Findings of Fact and Conclusions of Law made by Judge Armstrong are fully supported by the record as a whole. At the post-conviction hearing, the petitioner was represented by court-appointed counsel, and the following persons testified: Fred G. Crumpler, court appointed attorney for petitioner at his trial and who petitioner alleges coerced him into making a plea of guilty; Mrs. Christine Green, sister of the petitioner; Robert Haskins, Deputy Clerk of the Superior Court of Forsyth County and who petitioner alleges also coerced him into entering a plea of guilty; and the petitioner. The material facts were developed at the hearing, and no allegation of newly discovered evidence was made at the time of the hearing or now. The Court can find no reason that would indicate that the petitioner was not given a full and fair hearing, and concludes that the post-conviction hearing and the findings of fact from that hearing meet all the required tests. Therefore, the Court adopts the Findings of Fact of the state court.

Judge Frank M. Armstrong, who presided over the post-conviction hearing of the petitioner at the December 7, 1964, Term of Superior Court of Forsyth County in his order dated March 19, 1965, found that the petitioner's plea of guilty was voluntary. Judge Armstrong stated:

> "That on December 2, 1963, Mr. Fred G. Crumpler was appointed by the Court to serve as counsel for Henry C. Alford who was charged in a bill of indictment with the crime of murder in the first degree. That Henry C. Alford, through his said attorney, entered a plea of guilty to the offense of murder in the second degree on December 10, 1963. That before the plea was entered, Fred G. Crumpler, Jr., who is an able trial lawyer with extensive experience in the trial of criminal cases, made a thorough investigation of the case, including the questioning of the investigating officers, all other witnesses for the State, and other persons who appeared to have some information. That the said attorney contacted all witnesses named to

him by the defendant, except a person designated as 'Jap,' who could not be located; that the said attorney found that none of the witnesses could give testimony helpful to the defendant, but that all of their testimony was detrimental to the defendant. That the said attorney further found that the evidence against the defendant was overwhelming and that the petitioner was confronted with a very serious case of murder. That the said attorney discussed the matter with the petitioner on several occasions, and advised him of the testimony that the witnesses would give against him, and also advised him of the possible verdicts that a jury could render in the case. That the petitioner, after talking to his attorney and his sister, decided that he wanted to enter a plea of guilty to second degree murder and he signed a written statement in which he authorized his attorney to enter a plea of guilty of second degree murder in his behalf, said statement being sworn to before Mr. R. B. Haskins, a Deputy Clerk of the Superior Court. That Mr. Haskins read the statement to the petitioner and asked him if he understood it and the petitioner said he did, and that he stated that he wanted to sign it and that he did sign it under oath in the presence of the said Deputy Clerk. That thereafter on December 10, 1963, the petitioner through his counsel, entered a plea of guilty to murder in the second degree; that the petitioner's attorney did not persuade him to enter the said plea nor coerce him to do so.

"That the petitioner willingly, knowingly and understandingly entered a plea of guilty to murder in the second degree on December 10, 1963, in the Superior Court of Forsyth County and was sentenced to serve a term of thirty years in the State's Prison."

The Court is cognizant of the fact that it can only adopt the facts found by the state court, and the Court must supply the applicable law. *Townsend v. Sain, supra.* However, by adopting the state court's findings as to the voluntariness of

the petitioner's plea of guilty, the conclusion follows that the sentence was imposed after a valid guilty plea and the plea was sufficient without more to warrant a conviction. *Armpriester v. United States*, 4 Cir., 256 F. 2d 294 (1958), cert. den. 358 U. S. 856, 79 S. Ct. 88, 3 L. Ed. 2d 90.

The Court finds that petitioner has not been denied his constitutional rights; therefore, the relief sought is denied.

ORDER

IT IS ORDERED that the petition for writ of habeas corpus filed by the petitioner, Henry C. Alford, be, and the same is hereby denied and dismissed.

IT IS FURTHER ORDERED that the Clerk forward a certified copy of this Memorandum and Order to the Petitioner at the place of his confinement.

EUGENE A. GORDON
United States District Judge

A True Copy
Teste
Herman Amasa Smith, Clerk
By: Bobbie D. Wyont
Deputy Clerk
September 3, 1965

Appendix C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 10,391

Henry C. Alford,

Appellant,

versus

State of North Carolina,

Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro.

MEMORANDUM DECISION

Henry C. Alford, a North Carolina prisoner, appeals in forma pauperis from an order of the District Court.

Alford was convicted upon a plea of guilty of second degree murder and sentenced to thirty years by the Superior Court of Forsyth County. He did not appeal, but later instituted postconviction proceedings in the state court to collaterally attack the validity of his conviction.

On December 7, 1864, Alford was granted a plenary hearing by the state court. At the hearing he was represented by court-appointed counsel who urged that Alford's guilty plea was the product of fear and coercion and the inadequate representation of counsel. The state court denied Alford's petition for relief. Thereafter Alford petitioned the United States District Court for the Middle District of North Carolina (Gordon, J.) for a writ of habeas corpus. The District Court entered a show cause order and the State answered. Included in the answer was a transcript of the state-court hearing and the opinion of the state judge. On the basis of the record the

District Court determined that Alford had not been denied any right which would justify the issuance of the writ and dismissed the petition.

Forty-eight days after the District Court's order denying the writ was entered Alford filed a notice of appeal. The District Court considered the notice as "a motion in the cause to allow an appeal and a motion for a new hearing." (Rec. 4). Both were denied for the reasons set forth in the District Court's memorandum order. (Rec. 3-8). From that denial Alford appeals in forma pauperis.

The District Court was correct in denying Alford's motions. The record in the case clearly shows that he failed to attempt an appeal until well after the thirty-day time limit had expired. Moreover, there was no reason given why the case should be reopened in the District Court. That Court does not have to entertain successive writs. 28 U.S.C. §§ 2244, 2253.

There is no danger of injustice based upon a procedural technicality in this case. Alford has also submitted a petition for a writ of habeas corpus to a judge of this Court and that petition will be considered on the merits.

Accordingly the appeal is dismissed and a certificate of probable cause is denied.

Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

Harrison L. Winter
United States Circuit Judge

J. Braxton Craven, Jr.
United States Circuit Judge

A true copy, Teste:
Maurice S. Dean, Clerk,
U.S. Court of Appeals
for the Fourth Circuit.

Appendix D

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 220

Henry C. Alford,

Appellant,

versus

State of North Carolina,

Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro.

MEMORANDUM DECISION

Henry C. Alford, a North Carolina prisoner, has petitioned in forma pauperis for a writ of habeas corpus.

Alford's unsuccessful petition in the District Court has been noted in another case (No. 10,391). I have obtained a supplement to the record in No. 10,391 and after reviewing the files, transcript and other papers I have concluded that Alford is not entitled to a writ of habeas corpus.

Alford's petition is based upon several contentions. We turn first to the claim that his guilty plea was the product of fear and coercion as well as the ineffective assistance of counsel.

The record includes a transcript of a plenary hearing in a state court during Alford's unsuccessful attempt to avail himself of North Carolina's postconviction relief statute. The transcript reveals that Alford was represented by an experienced criminal lawyer who conferred with him on "numerous" occasions before trial. (Tr. 3).

There is a conflict in the testimony over why Alford actually pleaded guilty but the state court found that he did so because his attorney wisely advised him to plead guilty to second degree murder and escape the possibility of capital punishment. The state court also found that the attorney interviewed all the witnesses Alford named with the exception of one, who could not be located. (Supp. to Rec. preceding p. 37). The state judge found that Alford decided to plead guilty because he had no defense to the State's case against him for first degree murder and because the guilty plea allowed him to escape the possibility of the death sentence. There is ample evidence to support this finding of fact and I see no reason to disagree with it.

Having found that Alford's guilty plea was voluntarily made upon the competent advice of counsel, there is no reason to inquire into the claims Alford raises regarding illegal search and seizure, denial of witnesses and illegal detention. See *Hoffman v. United States*, 9 Cir., 327 F. 2d 489.

The District Court reached the same conclusion after a thorough explanation of the facts. (Supp. to Rec. pp. 37-44). I am of the opinion that the District Court's interpretation of the applicable facts and law is correct and therefore it is unnecessary to repeat either in detail.

The petitioner is allowed to proceed in forma pauperis but his petition is denied. Pursuant to 28 U.S.C.A. § 2241 (a) this order shall be entered in the records of the United States District Court for the Middle District of North Carolina.

Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

HENRY C. ALFORD, Petitioner	)	
v.	)	NO. C-98-G-67
STATE OF NORTH CAROLINA Respondent	)	

MEMORANDUM OPINION AND ORDER

GORDON, District Judge

The petitioner, Henry C. Alford, a prisoner of the State of North Carolina, has filed with this Court still another petition for a writ of habeas corpus pursuant to the provisions of Title 28, U.S.C. § 2254, and accompanies the petition with an affidavit of poverty. The petition was filed *pro se* and an order has been entered permitting the petition filed without the prepayment of cost for fees or security therefor. The petitioner contends his constitutional rights were deprived in that:

1. His home was searched without a search warrant being issued.

2. He was denied his right to counsel at an interrogation.

3. He was denied the effective assistance of counsel.

The voluminous files in this case reflect that this is the third petition for a writ of habeas corpus directed to the Federal Courts to be dealt with on its merits; this in addition to numerous collateral attacks directed through state court channels.

On September 7, 1965, his first petition for a writ of habeas

corpus was denied in a Memorandum Opinion from this Court which dealt sufficiently with petitioner's trial and state post-conviction hearing that they need not be reiterated here.

Since September 7, 1965, petitioner's motion to appeal from the above decision after the lapse of the requisite time limit was denied by Memorandum and Order dated November 24, 1965. This denial was affirmed on appeal.[1] On December 8, 1965, a petition for a writ of habeas corpus was filed directly with the United States Court of Appeals for the Fourth Circuit. In a Memorandum Decision dated August 3, 1966, the Honorable Clement F. Haynsworth denied the petition. Numerous other petitions and motions have been before this Court, but do not affect the merits of this present petition and require no discussion.

Petitioner raises substantially the same contentions in this petition as have been raised in the two previous federal petitions. Both Memorandum Decisions denying petitioner relief have held that his guilty plea was voluntary. This determination precludes any consideration of the first and second contentions in the present petition because the voluntary guilty plea waives all defenses and non-jurisdictional defects occurring in any prior stage of the proceedings against the person so pleading. *U.S. v. McMann*, 2 Cir., 349 F. 2d 1018 (1965); *Busby v. Holman*, 5 Cir., 356 F. 2d 75 (1966); *Bloombaum v. U.S.*, 4 Cir., 211 F. 2d 944 (1954).

In his third contention, the petitioner raises a question as to the competency of his counsel and the effectiveness of his assistance. Although Judge Haynsworth touched upon this allegation, it will be dealt with on its merits.

It is now well settled that a federal hearing is unnecessary if the petitioner received a full and fair evidentiary hearing in a state post conviction proceeding in accordance with the standards set out in *Townsend v. Sain*, 372 U.S. 293 (1963)[2]. This

---

1U.S.C.A., 4 Cir., Case #10,391, Memorandum Decision filed August 25, 1966.

2*Duckett v. Steiner*, 4 Cir., 332 F. 2d 178 (1964).

court can accept the findings of fact of the state court to which facts this Court must apply federal law.

On the basis of the post-conviction hearing, Judge Frank M. Armstrong entered an order on March 19, 1965, which made certain applicable findings of fact:

> "That on December 2, 1963, Mr. Fred G. Crumpler was appointed by the Court to serve as counsel for Henry C. Alford, who was charged in a bill of indictment with the crime of murder in the first degree. That Henry C. Alford, through his said attorney, entered a plea of guilty to the offense of murder in the second degree on December 10, 1963. That before the plea was entered, Fred G. Crumpler, Jr., who is an able trial lawyer, with extensive experience in the trial of criminal cases, made a thorough investigation of the case, including the questioning of the investigating officers, all other witnesses for the State, and other persons who appeared to have some information. That the said attorney contacted all witnesses named to him by the defendant, except a person designated as 'Jap,' who could not be located; that the said attorney found that none of the witnesses could give testimony helpful to the defendant, but that all of their testimony was detrimental to the defendant. That the said attorney further found that the evidence against the defendant was overwhelming and that the petitioner was confronted with a very serious case of murder. That the said attorney discussed the matter with the petitioner on several occasions, and advised him of the testimony that the witnesses would give against him, and also advised him of the possible verdicts that a jury could render in the case. That the petitioner, after talking to his attorney and his sister, decided that he wanted to enter a plea of guilty to second degree murder and he signed a written statement in which he authorized his attorney to enter a plea of guilty of second degree murder in his behalf, said statement being sworn to before Mr. R. B. Haskins, a Deputy Clerk of

the Superior Court. That Mr. Haskins read the statement to the petitioner and asked him if he understood it and the petitioner said he did, and that he stated that he wanted to sign it and that he did sign it under oath in the presence of the said Deputy Clerk. That thereafter on December 10, 1963, the petitioner through his counsel, entered a plea of guilty to murder in the second degree; that the petitioner's attorney did not persuade him to enter the said plea nor coerce him to do so."

Upon this set of facts it is conclusive that petitioner's counsel was not constitutionally defective under the applicable standards. *Tompa v. Virginia*, 4 Cir., 331 F. 2d 552 (1964).

This Court, having found petitioner has not been denied his constitutional rights, denies the petition and the relief sought therein.

ORDER

IT IS ORDERED that the petition for the writ of habeas corpus filed by the petitioner, Henry C. Alford, be, and the same is hereby denied and dismissed. IT IS FURTHER ORDERED THAT the Clerk forward a certified copy of this Memorandum Opinion and Order to the petitioner at his place of confinement and two certified copies to the Attorney General of the State of North Carolina.

Eugene A. Gordon
United States District Judge

June 1, 1967

A True Copy
Teste:
Herman Amasa Smith, Clerk

By:

Judy A. Mabe
Deputy Clerk